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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**SENTENCING (PAROLE TIME CREDIT) LEGISLATION
AMENDMENT BILL 2019**

EXPLANATORY STATEMENT

Presented by
Shane Rattenbury MLA
Minister for Corrections and Justice Health

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This Explanatory Statement relates to the *Sentencing (Parole Time Credit) Legislation Amendment Bill 2019* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Introduction

In the ACT, if a court sentences an offender to a term of imprisonment of more than one year, the court must set a non-parole period.¹ An offender is eligible to be released into the community on parole once the non-parole period set by the court has ended.

When released from full-time imprisonment on a parole order, offenders are supervised by the Director-General for the Crimes (Sentence Administration) Act 2005 with relevant powers and functions delegated to Community Corrections Officers in the ACT Corrective Services (ACTCS). Offenders serving a parole order must comply with core conditions of the order; any additional condition of the order imposed by the Sentence Administration Board (SAB) and any directions given to the offender by the Community Corrections Officer.

If an offender breaches their parole order, the SAB has a number of options including, where appropriate, cancelling the offender's parole order and returning them to custody to serve the balance of their sentence by full-time imprisonment. If an offender is convicted or found guilty of an offence that is punishable by imprisonment that was committed while they were on parole, the parole order is automatically cancelled.²

Currently in the ACT, while an offender is on parole they are not taken to have served any of the remaining period of imprisonment unless the parole order ends without being cancelled.³ As the ACT does not have a parole time credit regime, when an offender is returned to custody they serve the remainder of the sentence that was outstanding at the time they were released. For example, if an offender is released on parole with 12 months remaining on their head sentence and that offender is cancelled because of a breach of their parole order after 8 months, they are liable to serve the full 12 months that had been outstanding at the time of their release.

Australian Law Reform Commission (ALRC) reports⁴ have commented on the effect of parole revocation schemes across Australia which require time served on parole to be served again in prison if parole is revoked. Every Australian jurisdiction, except the ACT and the

¹ *Crimes (Sentencing) Act 2005*, s 65(2).

² *Crimes (Sentence Administration) Act 2005*, s 149.

³ *Crimes (Sentencing) Act 2005*, s 140.

⁴ See ALRC, *The Commonwealth Prisoners Act*, Report No 43, Interim (1988), paragraph 57. ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, April 2006, page 606. ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report 133, December 2017.

Northern Territory, has introduced legislative frameworks to remove the need for time spent on parole to be served again if parole is cancelled. These schemes are most commonly referred to as “clean street time”. In Victoria, the scheme is called “time to count” and within the prison system, the process is commonly referred to by offenders as “street time”. Under the parole revocation schemes in place across Australia, when a breach of parole results in a return to prison, the length of the remaining prison term can be affected depending on the scheme in operation. There are three types of parole revocation schemes in operation across Australia:

- 1) Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), automatically counts towards the head sentence (as in NSW, Queensland, SA, and WA),⁵
- 2) Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), does not count towards the head sentence and must be served again in prison upon the parolee’s return (as in the ACT, and the NT),⁶ or
- 3) Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), is presumed not to count towards the head sentence unless directed by the relevant parole authority, and must be served again in prison (as in Tasmania and Victoria).⁷

Requiring an offender to serve the period of time spent on parole in compliance with their conditions again has the effect of extending the time served under sentence. This operates as a disincentive for offenders to apply for parole, decreasing offender engagement with rehabilitation programs, increasing the prison population and leading to people released from prison without any form of supervision.

It has been noted that these provisions are ‘unnecessarily punitive’, in effect, imposing an ‘additional sentence’ on offenders.⁸ Stakeholders across Australia have also noted the disproportionate affect these schemes have, particularly on Aboriginal and Torres Strait Islander offenders.⁹ The ALRC Report - *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* has recommended (rec 9.2) the

⁵ *Crimes (Administration of Sentences) Act 1999* (NSW) s 164(2); *Corrective Services Act 2006* (Qld) s 211(2); *Correctional Services Act 1982* (SA) s 74(1); *Sentence Administration Act 2003* (WA) s 71(1)(a), 71(2)(a).

⁶ *Crimes (Sentence Administration) Act 2005* (ACT) s 160(3); *Parole Act (NT)* s 14(1)(a).

⁷ *Corrections Act 1997* (Tas) s 79(5)(a); *Corrections Act 1986* (Vic) ss 77B(2), 77C.

⁸ Legal Aid ACT, Submission 107 noted in the ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report 133, at page 313.

⁹ See, eg, Law Society of Western Australia, Submission 111; Law Council of Australia, Submission 108; Legal Aid ACT, Submission 107; Jesuit Social Services, Submission 100; NSW Bar Association, Submission 88; Change the Record Coalition, Submission 84; Aboriginal Legal Service of Western Australia, Submission 74; Aboriginal Legal Service (NSW/ACT), Submission 63; Public Interest Advocacy Centre, Submission 25 noted in the ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report 133, at page 313.

immediate abolition of the relevant provisions, and the adoption of regimes that count time on parole as time served if parole is revoked.¹⁰

Purpose of the Bill

The purpose of the Bill is to introduce a scheme to give certain offenders credit for the period of time served on parole complying with their parole obligations. The scheme set out in the Bill broadly aligns the method for calculating the remaining sentence with that used in other Australian jurisdictions and addresses ALRC recommendation (rec 9.2).

The Bill introduces the concept of ‘parole time credit’ into the ACT. Parole time credit counts the time spent on parole towards an offender’s sentence to which the parole order relates. The purpose of parole is to reintegrate an offender into the community and to support their rehabilitation. Offenders who serve their full sentence without applying for parole are released into the community without supervision. Supported reintegration improves community safety and reduces the risk of reoffending.

Not counting time served in the community in accordance with parole conditions may remove the offender from the community for longer than was intended by the sentencing court. Important factors that militate against reoffending such as housing and employment can be jeopardised by the loss of parole time credit and the subsequent disincentive for offenders. This is particularly the case for Aboriginal and Torres Strait Islander people who may choose to not apply for parole for fear that they will be unable to comply with the terms of the parole order. This can hinder reintegration and adversely impact community safety. Not counting time served for an offender is counter-productive to the purposes of parole.

The effect of parole time credit is that if an offender’s parole is cancelled and they are returned to full-time imprisonment, they are liable to serve whatever is left of the parole period, rather than what was remaining at the time they were granted parole.

The Bill supports the purpose of parole by creating an incentive for offenders to apply for parole without the associated fear of increasing the overall time they spend serving a sentence. Further incarceration leads to a disruption in a person’s life, including loss of employment, and potentially a loss of housing, relationships and social supports.

Release from detention without support to transition into the community can lead to a cycle of reoffending. Research by the Bureau of Crime Statistics and Research has found strong evidence that offenders released from prison on parole are less likely to reoffend than offenders released from prison without any supervision.¹¹ Therefore, counting time served on parole reinforces a rehabilitative approach to sentence administration, and as a consequence

¹⁰ Recommendation 9.2, ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report 133, at page 314.

¹¹ Wan W, Poynton S, Doorn G & Weatherburn D 2014. *Parole supervision and reoffending*. Trends & issues in crime and criminal justice no. 485. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/tandi/tandi485>

can assist in reducing recidivism rates and supports the ACT Government's commitment to reduce recidivism by 25% by 2025.

The Bill includes provisions which:

- a) states the general rule that parole time credit will be applied when a parole order is cancelled subject to limited exceptions;
- b) sets out the limited exceptions when parole time credit will not be applied;
- c) provides a sentencing court with a discretion to apply parole time credit in special circumstances when it would not otherwise be applied;
- d) allow for the calculation of parole time credit;
- e) applies the scheme to offenders who are subject to parole orders in the ACT and are found guilty or convicted of offending in other jurisdictions;
- f) introduce transitional arrangements for a period of 5 years from commencement; and
- g) make consequential amendments to the *Crimes (Sentencing) Act 2005* to ensure the consistent application of the scheme by both the ACT courts and the SAB.

Human Rights Considerations

In jurisdictions with an automatic parole time credit scheme, the reason for breaching parole is irrelevant to whether parole time credit will be applied. Even where a person has committed an offence while subject to parole, the time spent in the community is considered as time served against the sentence to which the parole order relates. Generally, this is calculated as the time between when the offender was released on parole and when the offence was committed, or in some instances if the date of the offence cannot be determined, the latest date on which it could have been committed.¹²

In jurisdictions which give discretion to the parole authority, the reason for the parole revocation and the date within which the breach took place are factors which can inform the parole authority's discretion whether to grant credit for time spent on parole in compliance with parole conditions. On its website¹³, the Adult Parole Board of Victoria states that if cancellation occurs for serious offending it is 'very unlikely' to result in parole time credit being granted to the offender. In addition, the amount of time spent on parole is a 'primary consideration', with the Adult Parole Board rarely granting credit for someone who has served less than three months on parole.

The model of parole time credit outlined in the Bill draws on elements used in other Australian jurisdictions. The general rule states that parole time credit will be automatically applied. The general rule is subject to three limited exceptions which disapply the general rule for granting parole time credit. Offenders whose circumstances fall within the exceptions will not receive parole time credit unless the court determines that special circumstances exist that warrant the application of credit either wholly or in part.

¹² See *Sentence Administration Act 2003* (WA) s 71(3)(b)(ii).

¹³ Adult Parole Board of Victoria (2019). Time to Count (Street Time). <https://www.adultparoleboard.vic.gov.au/ttc>

The exceptions and the calculation of the amount of credit to be applied against an offender's sentence engage, support and place limitations on the following rights under the *Human Rights Act 2004* (HR Act):

- Section 8 – Recognition and equality before the law
- Section 18 – Liberty and security of the person
- Section 21 – Right to a fair trial
- Section 22 – Presumption of innocence

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28(2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights (ECHR) has considered the positive obligation of governments to uphold rights in depth, noting the government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.¹⁴

The limitations on rights which arise through the application of the parole time credit scheme are addressed individually below and in the detailed clause by clause analysis.

Detailed human rights discussion

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*¹⁵. A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality

¹⁴ Colvin, M & Cooper, J, 2009 *Human Rights in the Investigation and Prosecution of Crime* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 *Positive obligations under the European Convention on Human Rights*, Council of Europe.

¹⁵ [1986] 1 S.C.R. 103.

between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”¹⁶.

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they appropriately consider the underlying principles of sentencing and are the least restrictive means available to achieve the purposes of the scheme. The scheme balances the need to give offenders credit for time served in compliance with parole obligations with the need to protect the community from repeat offenders who demonstrate an inability to live in the community in compliance with the conditions of their release.

Rights engaged and limited

The amendments in the Bill primarily engage and limit the right to equality before the law. For this reason, the limitation is discussed in detail below.

Other rights engaged and limited are discussed briefly below, or with reference to specific legislative amendments in the detailed clause by clause description below.

Section 8 – Recognition and equality before the law

Section 8 of the HR Act states that:

- “(1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.”

This right requires that no legislation should discriminate against an individual however formal equality may create unfair outcomes and so the **nature of the right** is not absolute.

The nature of the right affected (s 28 (2) (a))

The right is engaged and limited by excluding offenders who:

- a) commit serious offences or family violence offences while on parole for earlier offending of the same type; or
- b) reoffend within three months of their release on parole.

Any offender who falls into either of these categories does not receive the benefit of automatic application of parole time credit. The limitations on the right are subject to a discretion which allows the court to consider whether there are special circumstances in the particular facts of the case which merit the application of parole time credit.

¹⁶ *R v Oakes* [1986] 1 S.C.R. 103.

Section 161E ensures that offenders who commit an offence outside of the ACT while subject to a parole order issued in the ACT are treated in the same way as offenders who commit further offences in the ACT. Namely, that the general rule applies, unless the repeat offending falls within the categories of exemptions, in which case the SAB must decide whether parole time credit should be applied using the same special circumstances test as would be applied by a court had the offending occurred in the ACT.

The importance of the purpose of the limitation (s 28 (2) (b))

The **purpose of the limitation** is to provide the court with an opportunity to consider the purposes of sentencing in the context of further offending while on parole. Reoffending generates a community expectation around punishment and denunciation of the offender's behaviour. The *Crimes (Sentencing) Act 2005* (ACT) also specifies that a purpose of sentencing is to make the offender accountable for their actions.¹⁷ By limiting the right to equality before the law for offenders whose reoffending places them in the limited categories of exceptions to the general rule, these offenders circumstances can be considered more fully than if there is automatic application of the general rule.

The purposes of sentencing is integral to a consideration of the policy basis of criminal laws. When a person is sentenced for a family violence offence or for a serious offence, the sentence will be imposed for specific reasons linked to all of the circumstances of the offence. Punishment for criminal conduct is an essential component of any criminal justice system and is an appropriate moral response to the voluntary commission of an offence. Specific deterrence seeks to prevent offenders from engaging in further criminal conduct by demonstrating to them the adverse consequences of their offending. Specific deterrence may be afforded greater emphasis when sentencing a repeat offender because there is an assumption that the previous sentence was ineffective in its deterrent effect.

Rehabilitation looks to identify and address the underlying causes of criminal conduct, by changing an offender's attitudes, habits, beliefs, outlooks or skills to stop them from reoffending. One of the factors which will need to be considered by the court when determining if special circumstances exist in a particular case is the need for continued rehabilitation of the offender where earlier efforts have been unsuccessful.

Finally, denunciation is premised on the theory that a sentence can serve the purpose of communicating to the offender and the community the message that the law should not be flouted.¹⁸ By limiting certain offender's rights to equality before the law and disapplying a benefit which is applied to other offenders in clearly defined circumstances, the law is providing a vehicle for the court to denounce the conduct of an offender and represents a symbolic, collective statement of society's censure of serious criminal behaviour.

¹⁷ *Crimes (Sentencing) Act 2005*, section 7.

¹⁸ N Walker, *Why Punish?* (1991), 26. See also *Ryan v The Queen* (2001) 206 CLR 267, [118].

Nature and extent of the limitation (s 28 (2) (c))

The **nature and extent of the limitation** is restricted to offenders who have reoffended within three months of their release or who have reoffended by committing serious or family violence offences. The limitation creates a presumption against the grant of parole time credit to the limited category of offenders however this is subject to a discretion allowing the court to apply parole time credit where special circumstances exist to merit a reversal of the presumption.

Relationship between the limitation and its purpose (s 28 (2) (d))

A balance needs to be struck between the purposes of sentencing and the need for community safety. Due to the nature of the offending and the need to protect the community, recidivist offenders who commit family violence and serious offences are subject to a presumption against receiving parole time credit. Societal expectations for punishment, deterrence and denunciation are particularly strong with regard to offenders who commit these types of offences.

The majority of family violence offences are against women and children and it is now widely accepted that gender-based violence is a form of discrimination against women and children. The ECHR has confirmed the importance of characterising gender-based violence against women as a form of discrimination that public authorities are required to eliminate and remedy.¹⁹ Federal, State and Territory governments are obliged, under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women, to protect the right to private and family life of victims of domestic, family and sexual violence, including through effective prosecution and punishment of offenders. In the ACT, that obligation is further enshrined in section 12 of the HR Act (right to privacy and reputation).

Finally, offenders who commit further offences within three months of their release on parole are also subject to the presumption against receiving parole time credit. An offender who falls within this category of exemption has demonstrated that they are unable to abide by the terms of their parole obligations. Creating a further incentive to comply with parole obligations in the immediate period after release is the main reason for the inclusion of this category of offenders within the exemptions to the general rule.

Any less restrictive means reasonably available to achieve the purpose (s 28 (2) (e))

These restrictions are proportionate to the aim of keeping people safe and are the least restrictive means possible in the circumstances. The limitation is reasonable, considering the growing evidence that suggests the persistence and prevalence and impacts of violence in the community.

¹⁹ *Opuz v Turkey* [2009] ECHR, Application no. 33401/02 (9 June 2009).

Section 18 – Right to liberty and security of person

The right is engaged and limited by the application of the earliest date when calculating the amount of parole time credit to be counted towards the offender's sentence. The nature of the right is not absolute and may be limited by grounds and in accordance with the procedures established by law. The purpose of choosing the earliest date to be applied when calculating the amount of credit to be counted against the sentence is to ensure that as soon as an offender has been found to be in breach of their parole obligations, they are no longer receiving a benefit while administrative processes are undertaken to return them to custody.

The nature and extent of the limitation is to ensure that time is not counted against a sentence when an offender has clearly demonstrated through their behaviour that they are no longer willing or able to abide by the conditions of their parole order. The limitation is the least restrictive possible in that an offender is making an active choice to behave outside of the conditions set in their parole order and that it is only when the offender is arrested on suspicion of a breach of parole conditions or when the SAB makes a decision to cancel the parole order does the offender lose the benefit of parole time credit. In cases of reoffending while on parole, the offender is subject to the maximum time possible (i.e. the date of arrest or cancellation of parole) until they are found guilty or convicted of further offending at which point the amount of parole time credit to be applied to the offender's sentence is finalised.

Section 21 – Fair trial

The right to a fair trial includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, that is, the right of all parties in proceedings to be heard and respond to any allegations and the requirement that the court be unbiased and independent. The nature of the right may be absolute in itself, in that it can never be justified to hold an unfair trial, but many of the principles that characterise a fair trial are not absolute.²⁰

The right is perceived to be engaged and limited by the Bill where the SAB considers whether to apply parole time credit for offenders who have committed a further offence outside of the ACT.

The purpose of the limitation is to balance the right to a fair trial against the right to equality before the law. Offenders who commit further offences outside of the ACT must be treated in the same way as offenders who commit further offences while on parole in the ACT. In making the decision to cancel an offender's parole and the application of parole time credit to the offender, the SAB may hold a hearing to decide whether the offender has breached their parole obligations. The hearing is subject to all of the rules of procedural fairness and the offender is entitled to be represented by a lawyer or other advocate approved by the SAB. The offender may make submissions to the SAB about the issues relevant to the SAB's hearing. The offender may produce documents, produce exhibits and give evidence to the

²⁰ *Brown v Stott* (2003) 1 AC 681.

SAB. The offender may also present other evidence to the SAB or address the SAB on relevant matters.²¹ Further, an explicit right of appeal from decisions of the SAB has been included in the Bill to allow the ACT Supreme Court to consider SAB decisions and ensure consistency between the application of special circumstances by the court (when deciding cases under section 161D) and the SAB (under section 161E).

The limitation is the least restrictive possible to achieve a balance between the rights of the offender to a fair trial and the right to equality before the law.

Section 22 – Presumption of innocence

The right to be presumed innocent requires judges, juries and the relevant public authorities to refrain from prejudging any case. The authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.²²

The application of parole time credit places a perceived limitation of the right to be presumed innocent with regard to the end date for parole time credit being the earliest date specified in Table 161G. Where the end date of a parole time credit is specified as the day the offender is arrested, or the day an arrest warrant is issued for the arrest, or the day the offender failed to report that leads to cancellation, it gives the impression that the offenders guilt is being determined before the court has entered a conviction or the SAB has determined to cancel the offender's parole. The application of parole time credit is consistent with the right to presumption of innocence in section 22(1) of the HR Act. Calculation of parole time credit includes various dates when the period to be credited towards the offender's sentence could stop.

With regard to new offences, parole time credit applies until the date the offence was committed, however, this is only determined after a conviction or finding of guilt is recorded. For example, the period between the date when the offence is alleged to have been committed and the date the offender is arrested, or a warrant is issued for the offender's arrest would initially be presumed to be credited (consistent with presumption of innocence). However, if the offender is later found guilty, then this period is retrospectively determined not to be included in the calculation of parole time credit and is not counted towards service of the sentence. Although the end date in Table 161G precedes the offender's conviction for the second offence, the application of parole time credit is not finalised until the offender's parole is cancelled. If the offender's parole is cancelled as a result of conviction for new offending this is not finalised until a conviction is entered against the offender by the court. Finally, if the SAB has conducted an inquiry and decides not to cancel the offender's parole, the end date would then have no practical effect.

²¹ See section 209 of the *Crimes (Sentence Administration) Act 2005*.

²² UN Human Rights Committee General Comment 13, para. 7; *Allenet de Ribemont v. France*, 1995.

Sentencing (Parole Time Credit) Legislation Amendment Bill 2019

Detail

Contents

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the Act. The name of the Act will be the *Sentencing (Parole Time Credit) Legislation Amendment Act 2019* (Act).

Clause 2 — Commencement

The *Sentencing (Parole Time Credit) Legislation Amendment Bill 2019* commences on a day nominated by the Minister in a commencement notice. The provisions for a commencement notice are set out in section 77 of the *Legislation Act 2001*.

If the Minister does not commence the Act six months after the Act is notified on the Legislation Register, then the Act automatically commences the following day. The provisions for automatic commencement are set out in section 79 of the *Legislation Act 2001*.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Crimes (Sentence Administration) Act 2005* and the *Crimes (Sentencing) Act 2005*.

Part 2 – Crimes (Sentence Administration) Act 2005

Clause 4 – Definitions — Chapter 7 - Section 117 – new definition of non-ACT offence

Clause 4 introduces the definition of Non-ACT offence. The definition replicated the existing section 150 and section 151 of the *Crimes (Sentence Administration) Act 2005* and means that those sections can be amended with reference to the new definition to ensure clarity and consistency across the *Crimes (Sentence Administration) Act 2005*.

Clause 5 – Parole—effect of custody during order - Section 139 (1)

Clause 5 amends section 139 of the *Crimes (Sentence Administration) Act 2005* to clarify that time spent in custody during the period while on parole is not counted within the parole time credit applying under part 7.5A.

The effect of parole time credit is to ensure that the sentence remains ongoing whether the offender is in custody or on parole in the community in accordance with their parole

conditions. If the offender is returned to full time custody for a breach of parole obligations (this does not include new offending) the period in custody is counted towards the offender's original sentence. If the offender is in custody on suspicion of having committed a new offence, the court will determine the correct calculation of parole time credit and will sentence the offender for the new offending accordingly having regard to time served.

The clause ensures that periods of imprisonment are not counted twice when determining the amount of parole time credit which will be counted towards an offender's sentence of imprisonment. The amendment also ensure that time served in custody on remand awaiting a determination of guilt is only counted as time served towards the sentence for new offending and is not also counted as time served on the original sentence.

Clause 6 – Section 140 heading

Clause 6 amends the heading of section 140 of the *Crimes (Sentence Administration) Act 2005* to clearly identify that the section pertains to the completion of parole and calculations of parole where an offender has spent time in custody and received parole time credit.

The intention of this amendment is to signal to the reader that a sentence can be served in a number of ways, i.e. full-time imprisonment, on remand, or in the community on parole and that the sentence continues to run however the sentence is being served.

Clause 7 – Section 140 (2)

Section 140(1) of the *Crimes (Sentence Administration) Act 2005* states that an offender is under a sentence of imprisonment while subject to a parole order and that no period is taken to be time served against the sentence of imprisonment unless the parole order ends without being cancelled or the offender is otherwise discharged.

Clause 7 amends section 140(2) to clarify that the statement in section 140(1) is subject to section 139 regarding the time spent in custody for breaches of parole obligations (not new offending) and Part 7.5A regarding the application of parole time credit.

Clause 8 – Arrest warrant—breach of parole obligations Section 145 (2) (c)

Clause 8 introduces a requirement for the court, when issuing a warrant for an offender's arrest for a breach of a parole order, to state on the warrant for arrest of the offender the date that parole time credit ends.

The effect of this clause is providing administrative certainty for staff who are managing the offender's sentence until the court or the SAB has had an opportunity to consider the offender's circumstances and make a final determination about the length of parole time credit to be counted towards the offender's sentence.

Clause 9 – Cancellation of parole order for non-ACT offence - Section 150 (1)

This clause amends section 150(1) to refer to the new definition of Non-ACT offence thereby clarifying and shortening the provision.

Clause 10 – Cancellation after parole order has ended Section 151 (1)

Clause 10 amends section 151 of the *Crimes (Sentence Administration) Act 2005* to clarify the process for the SAB when cancelling an offender's parole order after it has ended.

Section 151(1)(a) addresses the situation where an offender completes the period of time required to be served under a parole order or the parole order ended by some other means except cancellation and after that period has ended the SAB decides that the offender has been convicted or found guilty of committing an offence against a territory law while subject to the parole order. This is the same situation which is dealt with under the current section 151(1). In this situation, the SAB must decide the date or the earliest date the offence was committed and is taken to have cancelled the offender's parole order on that date under section 148. The court determining guilt for the new offending is then required to consider the application of parole time credit as a part of the sentencing exercise for the new offence. The court will determine whether the offending falls within the categories of exceptions. If the new offending does not fall within these categories the amount of parole time credit to be counted against the offender's sentence will be determined in accordance with the new Part 7.5A.3.

Section 151(1)(b) addresses the situation where an offender's parole order has ended including by cancellation and after the order ends the SAB decides that the offender has been convicted or found guilty of a non-ACT offence while the offender was subject to the parole order.

Example 1: An offender is subject to a parole order in the ACT and they commit an offence in New South Wales. The offender is taken into custody in New South Wales. The offender therefore fails to check in with their Community Corrections Officer as required by the conditions of their parole order.

The Community Corrections Officer reports the failure to attend to the SAB which determines that the offender's parole order should be cancelled.

The parole order is cancelled on the earliest date that the offender failed to report in accordance with new Part 7.5A.3 and Table 161G.

At a later date the board is made aware that the offender has been convicted of an offence in New South Wales and is being held in custody. The date of the offending in New South Wales is two weeks before the date previously determined by the SAB as the date parole time credit ended.

Under section 151(2) the SAB must decide the date or earliest date when the offence was committed. Under the example provided above, this will be done with reference to the date

the court in New South Wales determined the offending occurred. The SAB is then taken to have cancelled the offender's parole order under section 148 on the earlier date and the amount of parole time credit which will be counted against the offender's sentence in the ACT will be reduced by two weeks.

Clause 11 – Notice of board decisions about parole New section 157 (1) (c)

Clause 11 is a consequential amendment to refer to the new section 161E.

Clause 12 - Section 157 (4)

Clause 12 introduces a requirement for the SAB, when notifying an offender of a decision to cancel their parole order under section 148 or section 156, to state on the notice the date that parole time credit ends. The effect of this clause is providing administrative certainty for staff who are managing the offender's sentence.

The Note under section 157(4) refers to the possibility that the date for parole time credit to end is set under Part 7.5A and that it may change if breaches of parole are later proven and refers to section 161I.

Clause 13 – Parole order—effect of cancellation Section 160 (4)

Section 160(3) states that on cancellation of a parole order the offender is taken not to have served any period of imprisonment for the sentence that remained to be served on the offender's parole release date.

Clause 13 is a consequential amendment to reflect that the section is subject to both section 139 and new Part 7.5A regarding the amount of credit to be counted towards the sentence to which the parole order relates if the offender spends time in custody for breaches of parole obligations or is eligible for a period of parole time credit in accordance with Part 7.5A.

Clause 14 – Cancellation of parole—recommittal to full-time detention Section 161 (3)

Section 161(2) states that the recommitting authority must order the offender be placed in full-time detention for a period equal to the period of imprisonment which the offender was liable to serve under the sentence to which the parole order relates on the offender's parole release date.

Clause 14 is a consequential amendment to reflect that the section is subject to section 139 and new Part 7.5A so that the period of time calculated under section 161(2) can be shortened if the offender does not fall into any of the categories of offending covered by the exceptions in section 161D.

Clause 15 – New part 7.5A

Section 140(1) of the *Crimes (Sentence Administration) Act 2005* states that while an offender is on parole, they are not taken to have served any of the period remaining on their sentence unless the parole order ends without being cancelled.

The insertion of Part 7.5A - Parole time credit means that when an offender's parole order is cancelled they are liable to serve the time remaining on their sentence at the time the breach was committed, not what remained to be served on the day of their release on parole, provided that they do not fall into any of the categories of exceptions set out in section 161D.

For example, currently if an offender is released on parole with 12 months remaining on their sentence and the offender's parole order is cancelled eight months later, they are liable to serve the full 12 months that had been outstanding on their sentence at the time that they were released on parole. If parole time credit is applied, they are liable to serve four months in custody, considering the crime-free eight-month period they spent under a sentence of imprisonment in the community.

Parole time credit acknowledges the effort that the offender has made (for example actively engaging in work, attending training courses or drug and alcohol rehabilitation), even if they were ultimately unsuccessful in completing their sentence while on parole. Further, many offenders encounter setbacks during their parole, particularly relapse into drug use. Parole time credit acts to motivate offenders to persevere with their parole conditions when they encounter such setbacks.

Division 7.5A.1 Preliminary

161A Application—pt 7.5A

This section sets out the broad application of parole time credit for all offenders.

Section 161A states that parole time credit only applies to an offender who has their parole cancelled. Offenders who complete their sentence (including any time spent on parole) have no need to access parole time credit to calculate the length of time remaining on their sentence. Parole time credit is not primarily a sentencing matter. It is predominately a way of calculating the length of sentence remaining to be served after parole has been cancelled.

The effect of this section is to make Part 7.5A applicable to all offenders who are subject to a parole order, who breach that parole order by breaching one or more of the parole obligations included in the parole order and who have that order cancelled.

For example, parole time credit will be available to all offenders sentenced for a first or subsequent offence committed while on parole after the commencement date. Any offender sentenced for a first or subsequent offence committed while on parole before the commencement date will not be eligible for parole time credit.

Example 2: On 3 January 2017, an offender was sentenced to a term of 2 years and 10 months for assaulting their partner in a domestic violence event. The non-parole period was 1 year and 8 months. The sentence was due to end on 2 November 2019.

The offender was released on parole on 8 September 2018.

On 5 January 2019, the offender assaulted another person during a nightclub brawl and was arrested.

The offender pled guilty to assault and was sentenced on 12 July 2019 to 3 years and two months for the second assault.

As the sentencing for the second offence occurred before the commencement date for the Sentencing (Parole Time Credit) Legislation Amendment Act 2019, the offender is not eligible for parole time credit and will serve the time remaining on their original sentence (1 year 2 months) as well as the 3 years and 2 months sentence for the second assault. Whether these sentences are consecutive or concurrent will be a decision for the sentencing judge. (See clause 18)

161B Definitions—pt 7.5A

Section 161B sets out definitions which are applicable to Part 7.5A.

Family violence offence is defined with reference to the definition in the *Family Violence Act 2016*. The definition of family violence can include behaviour that is sexually coercive, damaging property, harming an animal, stalking or deprivation of liberty which would not otherwise fall into the definition of serious violence offence in the Bill. The definition is intentionally broad to ensure that all types of domestic, family and sexual violence are covered. There are many ways that people can perpetrate violence against a family member and people who suffer this violence should be protected under the law.

Non-ACT family violence offence is defined as a non-ACT offence which is substantially similar to a family violence offence despite any differences in the penalty imposed by the other jurisdiction. The definition has been drafted to ensure that any differences in the penalty imposed for family violence type offences in other jurisdictions does not frustrate the application of the Bill in the ACT. The definition also ensures consistency between offenders who commit further offences on parole in the ACT and those who commit further offences while on parole in jurisdictions other than the ACT.

Parole time credit is defined as the period of time worked out in accordance with Part 7.5A.3. This definition is the main operative provision which allows for credit to be calculated.

Serious drug offence includes any offences against the parts of the Criminal Code that deal with trafficking, manufacturing, or cultivating drugs and the use of children in drug related offending. Offences under these parts have to be subject to a maximum sentence of 10 years imprisonment or greater.

Serious non-ACT offence is defined as a non-ACT offence which is substantially similar to a serious offence despite any differences which occur in the penalty imposed by another jurisdiction. The definition has been drafted to ensure that any differences in the penalty imposed for serious offences in other jurisdictions does not frustrate the application of the Bill in the ACT. The definition also ensures consistency between offenders who commit further offences on parole in the ACT and those who commit further offences while on parole in jurisdictions other than the ACT.

Serious offence includes drug and violence offences which are punishable by a maximum term of imprisonment of 10 years or more and all sexual offences.

Sexual offence includes all of the offences in Parts 3, 4 and 5 of the *Crimes Act 1900*. The decision has been made to include all offences in these parts because all sexual offences are serious crimes that can have a long-lasting effect on victims/survivors, their families and the community. Any form of a sexual offence is serious, and everyone is entitled to protection under the law. Sexual offenders choose to commit these crimes and they are responsible for their actions.

Serious violent offence is defined as offences in part 2 and part 2A of the *Crimes Act 1900* which are punishable by a maximum term of imprisonment of 10 years or greater or the offence of Aggravated Robbery. The 10-year threshold for these offences has been chosen to ensure the widest possible application of the parole time credit scheme while balancing the need to address serious repeat offending. Setting the threshold at 10 years in the Bill indicates that the level of seriousness needs to be sufficiently high to trigger the automatic disapplication of parole time credit.

Other definitions in this section are discussed elsewhere in the Bill in the context of the sections to which they relate.

Division 7.5A.2 – Parole Time Credit—rules for applying

161C General rule

This section sets out the general application of the parole time credit rule. It states that parole time credit will be applied as time served against an offender's sentence to which the parole order relates. The section is subject to the exceptions set out in section 161D.

The automatic application of parole time credit subject to limited exceptions provides an incentive for offenders to complete their sentence without fear of increasing the overall time they spend serving a sentence of imprisonment. Counting time served on parole reinforces a rehabilitative approach to sentence administration and, as a consequence, can assist in reducing recidivism rates.

The purpose of parole is to reintegrate an offender into the community, not counting time served for an offender is counter-productive to that purpose. Not providing parole time credit may jeopardise important factors that militate against reoffending such as housing and

employment. This can hinder reintegration and adversely impact community safety and the corrective services system.

Under the general rule, parole time credit will be applied in full as determined in accordance with the calculation provision set out in section 161G.

161D – Exceptions—certain ACT offences

This section sets out the exemptions from the general rule applying parole time credit.

Three exemptions apply to the general rule:

- (i) second offence committed within 3 months of release on parole
- (ii) serious offence committed while on parole for a previous serious offence
- (iii) family violence offence committed while on parole for previous family violence offence

Commission of new offence within three months of release on parole

Parole obligations are designed to promote positive behaviour (e.g. engagement in counselling, drug and alcohol rehabilitation and positive reintegration into the community). Parole obligations can also be used to detect and deter negative behaviour (e.g. illicit drug use). An offender who makes little or no use of the support provided and demonstrates limited or no effort towards their rehabilitation by committing further offences within three months of their release on parole, may not merit any parole time credit.

The policy intent behind excluding offenders who reoffend within three months of their release on parole is that reoffending within that timeframe demonstrates a lack of willingness or inability to abide by parole obligations. A strict requirement of compliance enforced by the non-availability of parole time credit may provide the offender with an incentive to comply for the entire parole period. Another reason for not granting parole time credit to offenders who reoffend within three months of release is that the failure to comply with the requirements of parole may indicate that the offender is, or is likely to be, a danger to the community and therefore requires a stricter sentence administration response.

The three-month exemption creates an incentive for offenders to comply with the core and other obligations of parole and ensures that the ACT is aligned with other jurisdictions treatment of offenders in this situation.

Repeat serious offences

The effect the exemption for offenders who commit a serious offence while on parole for a previous serious offence is to create a presumption against the application of parole time credit for these offenders. The policy behind the exemption for repeat serious offenders and repeat family violence offenders is to allow the court to consider the underlying principles of sentencing including punishment, denunciation and accountability and to balance community

expectation that an offender will serve the full period of their sentence in custody when they have demonstrated a disregard for the law.

Parole is a privilege and if that privilege has been abused by the offender's failure to abide by their obligations through the commission of a further serious offence, the person deserves to be returned to detention to serve the full sentence by full-time imprisonment. The decision about whether the offender should be afforded any of the benefit of parole time credit is left with the court if the court is satisfied special circumstances apply to the offender.

If an offender on parole for a serious violent offence is found guilty of another type of offence (for example, theft), the offender would still be eligible for parole time credit. Similarly, if the offender is on parole for an offence other than a serious offence and commits a serious offence, they would be eligible for the automatic application of parole time credit.

Repeat Family Violence offences

The policy intention behind this section is to capture situations where the level of offending may not reach the threshold of 'serious offending' as defined in the Bill but the repeated behaviour demonstrated by the offender should be denounced and the penalty should reflect the seriousness of that offending such that the offender should not be given the benefit of parole time credit.

Example 3: An offender assaults their partner and is found guilty of assault occasioning actual bodily harm. The maximum penalty for this offence is 5 years. The assault was significant and the victim was hospitalised for a long period of time, however, the offender was not able to be charged with intentionally inflicting grievous bodily harm because the injuries sustained by the victim were not ongoing.

The offender is sentenced to 4 years in prison with a non-parole period of 2 years. A domestic violence order is issued to protect the victim from the offender. After serving 2 years in custody, the offender is released on parole and 6 months later begins stalking the victim. The offender is convicted of stalking the victim.

The maximum penalty for stalking is 5 years if the behaviour involved the contravention of an injunction or other order made by the court. Both offences were committed by the offender in a family violence situation and the impact on the victim from the offending was significant.

In this example, neither offence meets the definition of a serious offence and because the offending occurred more than 3 months after the offender's release on parole the general rule of parole time credit would normally apply. However, given the need to protect the right to private and family life of victims of domestic, family and sexual violence, including through effective prosecution and punishment of offenders, the presumption for the application of parole time credit has been reversed in these limited circumstances.

Section 161D(3)(a) – Court discretion to apply parole time credit in special circumstances

Parole time credit can be used to recognise the efforts made by offenders who have abstained from offending while on parole, a key rehabilitative indication, but who have not been able to comply with all their parole obligations. This approach recognises it may be appropriate to acknowledge the offender's rehabilitation efforts or other subjective circumstances in determining whether parole time credit should be applied.

Section 161D(3)(b) – Court discretion to apply parole time credit in whole or in part

Section 161D(3) provides the court with a discretion to reverse the presumption against applying parole time credit for offender who fall within the categories outlined in the exceptions. The wording of the test creates a reverse onus. That is, the accused person bears the burden of satisfying the court as to the existence of special circumstances.

The discretionary nature of the special circumstances provisions makes it impossible to give a precise list of factors that should be considered by a court when considering whether to exercise the discretion in the provision. There is usually not a single factor alone which makes a situation unusual, unforeseen or exceptional, but a combination of factors applying to each individual. Some factors which could be considered as determining whether to exercise the discretion include if the offender:

- a) had a mental or intellectual disability, disorder, disease or illness, including anxiety and depression which affected their offending behaviour;
- b) has been engaging with rehabilitation and counselling services and has had a momentary lapse in behaviour which has resulted in the offender facing the new charges;
- c) had a serious addiction to alcohol or other drugs and a relapse into problematic drug use was a factor involved in the further offending; or
- d) had also been a victim of a serious offence crime.

The usual rules of procedural fairness will apply to decisions made by the court in determining whether to apply parole time credit under s 161D(3). Given that the decision about the application of parole time credit will be made in parallel with the sentence for the new offending it will become a matter which can be appealed as part an appeal against a sentence.

As well as having a discretion about the general application of parole time credit, section 161D(3)(b) provides the court with the discretion to apply parole time credit in whole or in part. In *Veen v The Queen*²³ Chief Justice Mason and Justices Brennan, Dawson and Toohey of the High Court noted that:

. . . sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving

²³ [No.2] 164 CLR 465.

weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions. [at 476.]

Allowing the court to decide about the full or partial application of parole time credit in the context of new offending acknowledges the difficulty inherent in sentencing and supports the application of the sentencing principles when determining the appropriate outcome for an offender.

161E – Exceptions—certain non-ACT offences

Section 161E provides the mechanism for the SAB to apply parole time credit in circumstances where an offender has breached their parole obligations by committing an offence punishable by imprisonment outside the ACT, which:

- (a) was committed within three months of the parole order being made, or
- (b) was a serious offence and the offender was on parole for a serious offence, or
- (c) was a family violence offence and the offender was on parole for a family violence offence.

Section 161E requires the SAB to decide whether, and if so, how much, parole time credit is to apply to an offender to whom the section applies.

The circumstances listed in s 161E(1) mirror the exceptions to parole time credit referred to in s 161D(1) that apply to a sentencing court dealing with a second offence that was committed in the ACT. In this regard, the Board is making a similar determination to that which the Court makes where an offender breaches parole by committing a new offence in the ACT.

The policy intention behind this section is to ensure equality for all offenders subject to an ACT parole order. If offending takes place in a jurisdiction other than the ACT, ACT legislation cannot be applied by the sentencing judge in that jurisdiction. While sentencing principles are similar across jurisdictions, it is not possible to require parole time credit to be applied by a non-ACT court sentencing an offender who has breached an ACT parole order by committing a non-ACT offence. This provision allows an offender in those circumstances to potentially receive the benefit of parole time credit as it provides a mechanism for the SAB to apply parole time credit. The power is provided to the SAB as, unlike the situation where an offender has breached parole by committing an offence in the ACT, an ACT Court would not be dealing with the offender. The SAB however may deal with the offender pursuant to s 150 (if the breach comes to the attention of the SAB).

It is noted that s 161E does not create an obligation on the Board to proactively make enquiries to determine whether an offender has committed an offence in another jurisdiction during the offender's parole order. Rather, it is merely intended to provide a mechanism for the SAB to deal with such offenders if that type of offending comes to Board's attention.

161F Appeal to the Supreme Court—order by board

Section 161F inserts an explicit right of appeal from section 161E where the SAB makes an order about whether an offender's parole time credit is to be taken as time served against their parole sentence, in circumstances where the offender's relevant second offence is a non-ACT offence.

The appeal right is to the ACT Supreme Court and provides an essential safeguard to ensure the scheme's overall consistency with the right to a fair trial under the HR Act and equality before the law. The appeal right also allows the court to oversee SAB decisions and ensures consistency between decisions of the SAB and the court regarding the application of parole time credit for offenders who fall within the categories of exceptions set out in section 161D.

The appeal will also act as a stay to the decision of the SAB regarding the application of parole time credit thereby preventing the possibility that incorrect decisions could lead to a person's imprisonment for longer than should otherwise apply.

Division 7.5A.3 – Parole Time Credit – how to apply

161G Working out parole time credit—general rule

This section refers to Table 161G which sets out how parole time credit should be calculated. The Table calculates parole time credit as the period beginning on the offender's parole release date and ending on the day before the earliest of the following:

- 1) if the offender is arrested by a police officer without a warrant under section 144 of the *Crimes (Sentence Administration) Act 2005*, the day of the arrest;
- 2) if an arrest warrant is issued by the court under section 145, the day when the warrant is issued;
- 3) if a warrant is issued by the SAB under section 206 and the SAB decides to cancel the offender's parole under section 148 or section 156, the day the warrant is issued;
- 4) if the offender fails on two or more occasions to report as required by a condition of their parole order and the parole is cancelled because of the failure to report:
 - (a) the earliest day when the offender failed to report; or
 - (b) a later day determined by the SAB, taking into account the dates on which the offender failed to report.

- 5) if the offender commits an offence while on the parole and is convicted or found guilty by a court of the offence:
 - (a) the day the court determines the offence was committed; or
 - (b) if the court determines the offence was committed on more than one day, or within a range of days—the earliest day determined by the court;
- 6) in any other case—the day when the parole order is cancelled.

Setting out the method for calculating parole time credit in a table ensures that the number of days credited towards an offender's sentence are clearly calculatable and transparent. The intention behind this section is to ensure the offender, legal counsel, the judiciary, the SAB and ACT Corrective Service staff involved in the criminal justice process and/or the management of the offender are able to understand and calculate the time remaining on the offender's sentence.

The day before the day determined in accordance with the table has been specified because the first day that the offender spends in custody is counted as a day in custody and therefore could be counted twice if the offender is considered to be both on parole and in custody. The day in custody will be considered by the court as time served when determining any sentence for new offending. If the offender's return to custody is for a breach of parole obligations rather than for new offending, the date the offender is returned to custody is counted by section 139 of the *Crimes (Sentence Administration) Act 2005*.

This section and Table 161G have been drafted to be consistent with the right to presumption of innocence in section 22(1) of the HR Act. The end dates for parole time credit are designed to maximise the amount of time an offender is credited towards their sentence while also ensuring that the scheme does not create an incentive for parolees to disengage from supervision while on parole or receive the benefit of administrative or other delays.

Arrest without a warrant under section 144 of the *Crimes (Sentence Administration) Act 2005*

The intention behind setting the date of the arrest without warrant as the date that parole time credit ends is to stop parole time credit for the offender as soon as they are arrested on suspicion of breaching their parole obligations. The police officer who arrests the offender is required to believe on reasonable grounds that the offender has breached their parole obligations. If it is later proven that the offender committed an offence, the date parole time credit ends can be backdated by the court sentencing the offender for the new offence. Similarly, if the offender is arrested for a breach of parole conditions (other than new offending) and the breach is not proven the action of section 139 ensures that the period the offender spends in custody is counted towards the offender's overall sentence.

Arrest under warrant issued pursuant to section 145 or section 206 of the *Crimes (Sentence Administration) Act 2005*

The policy intention behind stopping parole time credit when a warrant is issued either under section 145 or section 206 rather than when the breach is alleged to have occurred is to give offenders the benefit of the most parole time credit possible. This supports the purpose of parole; creates an incentive for offenders to continue to comply with parole after the first breach of a parole order is recorded; and ensures administrative certainty.

For example, where there has been a period of non-compliance with conditions which have not been serious enough to merit cancellation of parole, the offender will be given the benefit of any period between the original breach of parole obligations and the date that the warrant is issued for the offender's arrest in order to encourage them to make genuine attempts to comply with conditions.

Example 4: An offender is released on parole on 18 February 2021 with 4 years remaining on their sentence.

The offender has a history of drug addiction and has completed a rehabilitation course while in detention and is positive that they can stay off drugs once released. The offender does well with support in the community and doesn't breach any of their parole conditions for 3 years.

On 2 July 2024, the offender's mother who represented a key pro-social support for the person passes away. Following this, the offender relapses into problematic drug use.

The Community Corrections Officer directs the offender to provide a sample of their urine for the purposes of a drug test. The presence of drugs is detected in a urine sample collected on 26 July 2024.

The Community Corrections Officer reports the breach to the SAB which holds a hearing and determines that the breach does not constitute a serious risk to the community and the offender is given a warning.

The offender continues to use drugs and the Community Corrections Officer reports three consecutive positive urine samples over a short period and other failures to follow direction. The SAB determines to hold a hearing into whether the offender has breached their parole obligations.

After the offender fails to appear before the SAB on 20 December 2024, the SAB issues a warrant to bring the offender before the SAB and the offender is arrested on 24 December 2024.

The SAB decides that the risk to the community from the offender's breaches of parole obligations is now so significant that parole is cancelled. The offender is immediately returned to full-time custody.

Parole time credit stops on 20 December 2024 (i.e. the date of the SAB issued the warrant for the offender's arrest) and the offender is liable to serve the remaining 60 days outstanding on their sentence.

If the date of the first breach had been used as the date that parole time credit ended the offender would not have received the benefit of the further 5 months spent in the community attempting to re-engage with drug rehabilitation services and would not have had any incentive to attempt to stay off drugs.

Absconding and failure to report in accordance with parole obligations

Despite the approach adopted in calculating parole time credit, it is important that when an offender leaves the territory or has a series of failures to report (absconds) and this leads to the cancellation of the parole order, offenders are not eligible for an extended period of credit as a result of their behaviour which is clearly in breach of their parole obligations.

Absconding is clearly a breach of conditions of parole. The policy basis for treating absconding differently to other breaches of parole conditions is that this type of breach is a clear and deliberate repudiation of the terms of conditional release on parole. Other breaches, including non-consecutive failures to report may not be so clearly deliberate and therefore the benefit of any administrative delays is given to the offender through the application of the most permissive time period available. Care has been taken when setting the date that parole time credit ends for these offenders to ensure that offenders who have a reasonable excuse for not attending a SAB hearing or who were unable to attend for valid and reasonable circumstances are not disadvantaged by the application of this provision.

For example, following a series of consecutive failures to report, an offender who absconds will have the date parole time credit ends backdated to the date that they first failed to report. This will limit the amount of credit offenders can get when they abscond.

Example 5: An offender is sentenced on 4 September 2019 to 2 years and 8 months (with a non-parole period of 1 year and 8 months) for selling methamphetamine at a Canberra nightclub.

The offender is released on parole on 17 May 2021 with 11 months and 12 days remaining on their sentence. The offender is required to report to their Community Corrections Officer every Wednesday at 10am. The offender successfully reports for the first 2 weeks following release but on Wednesday 2 June 2021 the offender fails to report as required. The Community Corrections Officer makes a report to the SAB regarding the breach. The offender reports to the Community Corrections Officer as required on the following Friday explaining that they had slept through the reporting appointment.

The offender reports as required for the next 14 weeks and on 13 September 2021 the offender fails to report. The Community Corrections Officer makes a report to the SAB about the breach. The offender does not report as required for the next 3 weeks.

Enquiries into the offender's whereabouts reveal that the offender has left the ACT and is now living in Sydney. A core obligation of parole is to not leave the ACT without permission.

On 6 October 2021, the SAB holds a hearing into the breaches and determines that the offender has left the Territory without leave to do so. A warrant is issued for the offender's arrest and the warrant states that parole time credit stopped on 13 September 2021 (i.e. the date the offender first failed to report in the series of failures to report which resulted in the determination that they had absconded from the ACT).

The date parole time credit stops is the first date in the series of failures to report which led to the cancellation of the parole order, not the date that the offender first failed to report due to sleeping through their appointment.

Commission of a new offence

Where an offender commits an offence while on parole for an earlier offence and the new offending does not fall into any of the categories of exceptions outlined in section 161D the general rule applies parole time credit until:

- (i) the date determined by the court that the new offending occurred; or
- (ii) if the court determines the offence was committed on one or more days or within a range of days – the earliest day determined by the court.

Example 6: An offender was sentenced to 4 years and 6 months years with a non-parole period of 2 years.

The offender was released on parole in September 2019 and had 2 years and 6 months remaining to serve on their sentence.

On 4 April 2021 (19 months after being released) the offender commits a burglary and was arrested and refused bail.

In July 2021, the court found the offender guilty of committing a burglary on 4 April 2021 and was remanded for sentencing in October 2021.

In handing down the sentence for burglary the Judge noted that parole time credit applied in this case because the offences committed did not fall into any of the exceptions outlined in section 161D of the Crimes (Sentence Administration) Act 2005 and that the offender had been crime-free in the community for 19 months before reoffending.

Therefore, the time remaining to be served on the original sentence was 11 months. This sentence was to be served concurrently with a 3-year sentence for the offence of burglary.

Cancellation of a parole order in any other case

Where an offender's parole order is cancelled for any other reason the cancellation date is taken to be the date that parole time credit ends. Reasons for the parole order to be cancelled which are not covered by the other situations outlined in the table include but are not limited to:

- (i) where the offender voluntarily attends a SAB hearing and the SAB decides to cancel the offenders parole order (i.e. a warrant was not issued to compel the offender to attend);
- (ii) the offender asks to have their parole order cancelled for any reason; or

- (iii) the offender is in custody awaiting a determination by the court on other charges and asks the SAB to cancel their parole order.

Parole time credit is taken to stop on the date the SAB cancels the parole order to give the offender the benefit of as much credit as possible while also balancing the SAB's decision that the offender poses such a risk to community safety that they should no longer be allowed conditional release in the community.

Application of the calculation provisions to offenders who have a current warrant for their arrest

Offenders who currently have an outstanding warrant for their arrest and are returned to custody for either a breach or a new offence after the commencement date will be eligible for parole time credit subject to the same conditions set out above. Offenders who absconded before the commencement date will have their parole time credit backdated to the date they absconded.

161H Working out parole time credit — exceptions

In the same way that the general rule applies, if an offender falls within the categories of exceptions created in section 161D, parole time credit is calculated as beginning on the date that the offender is released on parole and ends on the day before the day the court determines that the second offence was committed or if the offending occurred over more than one day or within a range of days – the day before the earliest day determined by the court.

In *R v Smith*²⁴, Morrison JA (with whom Muir JA and Daubney J agreed) stated at [29] that where the parolee commits another offence, 'the only time served...is that which was served prior to committing the offence which subsequently, by way of sentence, results in the automatic cancellation of the parole order', which he described at [30] as 'a coherent system where a prisoner commits an offence during the period of a parole order'.

The day before the day the offending occurred (as determined by the court) has been chosen because the day an offender is brought into custody is considered as a day in custody. Therefore, it is considered as time served when the court determines the length of the sentence and whether the sentences should be served consecutively or concurrently for the old and new offending.

161I Parole time credit — shortest period to apply

This section acts to ensure that where multiple breaches of parole occur or new offences have been committed all or several of which led to the cancellation of the offender's parole, only one period of credit is counted towards the offender's parole sentence.

²⁴ [2015] 1 Ad R 323

Section 161I(3) acts to ensure that the shortest possible period of parole time credit is to be applied in the circumstances of the parole order cancellation. The shortest period of time for any one of the reasons for cancellation of a parole order has been chosen to ensure that offenders are not receiving credit for time spent in the community while not in compliance with their parole obligations.

Clause 16 – Parole order transfer—effect of registration under this Act Section 168 (5)

This clause is a consequential amendment to reflect the application of section 139 and to refer to the new Part 7.5A.

Clause 17 – Arrest of offender for board hearing - New section 206 (3)(d)

This clause inserts a new provision which provides administrative clarity for staff who are administering sentences. The provision requires the SAB to write on the warrant which authorises the offender's arrest for a hearing of the SAB to state the end date for parole time credit (being the date that the warrant is issued). The policy intention behind this clause is to ensure that everyone involved with the management of the offender knows when parole time credit stopped and the easiest way of achieving this policy aim is to write the date on the warrant which compels the offenders arrest and appearance before the SAB.

Clause 18 – New chapter 22

Chapter 22 Transitional—Sentencing (Parole Time Credit) Legislation Amendment Act 2019

Section 1002 Definitions—ch 22

This section defines commencement date as the date the *Sentencing (Parole Time Credit) Legislation Amendment Act 2019* commences.

Section 1003 Parole time credit—breaches before commencement day

The section sets out the eligibility for parole time credit for offenders who, on the commencement date, have breached the conditions of their parole order but who have not yet had the parole order cancelled. If the parole order is cancelled after the commencement date the offender is eligible to receive parole time credit in accordance with Part 7.5A.

Section 1004 Parole time credit—offenders awaiting sentence

This section sets out the eligibility criteria for offenders who on the commencement day are in custody awaiting sentence for a new offence committed while the offender was subject to a parole order and who after the commencement date are sentenced for the offending. Offenders in this situation are eligible to receive parole time credit in accordance with the rules set out in Part 7.5A.

The retroactive application of parole time credit affords the widest application of the scheme and ensures that offenders who are on parole before the commencement are able to have the

time spent in the community in compliance with their parole conditions count towards their sentence.

Section 1005 Parole time credit applies in relation to old parole orders

Section 1005 clarifies the situation for offenders who are subject to parole orders made under the *Rehabilitation of Offenders (Interim) Act 2001* (repealed). Offenders who have outstanding warrants for their arrest under the provisions of earlier legislation are eligible for parole time credit in the same way that offenders subject to a parole order under the *Crimes (Sentence Administration) Act 2005* are eligible.

Section 1006 – Transitional regulations

Section 1006 enables the Executive to make regulations dealing with transitional matters. The section contains 2 different regulation making powers.

Section 1006(1) enables the making of a regulation to deal with any transitional matter that arises as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act and not widen the Act's purpose.

Section 1006(2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify Chapter 22 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Section 1006(3) gives a regulation under section 1006(2) full effect according to its terms.

A provision of Chapter 22 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Also, any modification by regulation of Chapter 22 of the Act has no ongoing effect after the expiry of the Chapter.

Section 1007 – Expiry – Chapter 22

This clause provides that the transitional arrangements expire 5 years after the commencement date.

Clause 19 – Dictionary, new definitions

This section inserts new definitions into the dictionary.

Part 3 – Crimes (Sentencing) Act 2005

Clause 20 – Imprisonment—concurrent and consecutive sentences Part 5.3 heading, new note

This clause inserts a new Note referring to the new Part 7.5A. It is important that a sentencing judge's attention is drawn to the application of parole time credit when sentencing offenders for a new offence committed while on parole.

The basis for this approach lies in the principle of totality, which generally holds that a court sentencing an offender for a number of offences should ensure that the total sentence imposed is a just and appropriate measure of the total criminality involved (see *Postiglione v The Queen* [1997] HCA 26).

However, at the time of sentence for a new offence, no action may have been taken by the SAB in respect of the breach of parole because they were unaware of the new offending. Therefore, it falls to the court to determine whether parole time credit will or will not be considered and whether this will have a material impact on the calculation of the time remaining to be served and the overall time to serve by the offender for both the previous offending and the new offending.

In other cases, the SAB may have acted to cancel an offender's parole order either because of a request from the offender or a notification to the SAB about the pending charges. Parole is cancelled automatically on the finding of guilt or upon conviction, but the consequences of the cancellation, in terms of parole time credit, may not be known. In any of these circumstances, the policy intention behind this amendment is to ensure that the court turns its mind to the application of parole time credit and considers the effect of the scheme on the imposition of consecutive or concurrent sentences.

This could impact on the start and end date of sentences imposed by the court. Ensuring that the court has turned its mind to these factors will reduce the likelihood of miscalculations, reduce the potential for appeal and ensure procedural fairness.

Clause 21 – Imprisonment—explanation to offender New section 82 (1) (i)

This clause inserts a new subsection requiring the court to ensure as much as is reasonably possible an offender has explained to them the application or dis-application of parole time credit to their sentence. It is important for offenders to understand the length of a sentence and how it has been calculated. The policy intention behind this amendment is to ensure offenders understand their sentence and justice is appropriately administered. This is particularly important where an offender is facing multiple sentences to be served concurrently and/or consecutively.

Clause 22 – Imprisonment—official notice of sentence New section 84 (2) (i)

This clause inserts a new subsection which provides administrative clarity for staff who are administering offenders' sentences particularly in relation to release dates. The provision

requires the court to write on the official notice of sentence the end date for parole time credit.

The policy intention behind this clause is to ensure that everyone involved with the management of the offender knows when parole time credit stopped and the impact of this on the offender's overall sentence. The simplest way of achieving this policy aim is to write the date on the notice which accompanies an offender when they are sentenced to a period of full-time imprisonment.